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No. 93-4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent, Chicago Fire Fighters Union Local No. 2, and twenty-two individual members of the union who are also Respondents in *Daley v. Chicago Fire Fighters Union Local 2*, respectfully submit this brief in opposition to granting the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

A. Supplanting Validated Promotional Exams With a System of Quotas

In the summer of 1987, the Commissioner of the Department of Personnel of the City of Chicago instructed the Commissioner of the Chicago Fire Department ("CFD") that until "the effects of past discrimination have been corrected," 25% of all future promotions to the ranks of engineer and captain within the CFD were to be reserved for CFD minority members. (Chicago Fire Fighters, R. 71: Exs. E and F, at 1, 4; Pet. App. 24a, 87a; Resp. App. 8a, 15a-16a.)[1] The promotional quotas of 20% black and 5% Hispanic were conceived by officials of the City's Departments of Law, Personnel and Fire at a series of private meetings which were not open to either members of the public or rank and file nonminority CFD employees who stood to lose promotional opportunities on account of the quotas. (R. 76: Joyce Dep. 222-24.)

The City began implementing promotional quotas within the CFD once the program received approval from the Mayor, who at that time was the late Harold Washington. On August 16, 1987, 8 black firefighters were awarded out-of-rank-order promotions to engineer. (R. 26: Answer, ¶¶ 14, 28; Pet. App. 87a.)[2] The preferences

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[1] All record references herein are to the record in *Daley v. Chicago Fire Fighters Union*, and citations to the opinions of the court of appeals (1a-83a) and those of the district court (84a-106a) refer to the appendix attached to Petitioners' writ, and will be noted as "Pet. App." References to materials in the appendix attached to Respondents' brief in opposition will be designated as "Resp. App."

[2] In the previous 12 months minorities had received 21.68% of the engineer promotions which were awarded on a rank order basis. (R. 71: Def. Exs. L, N.) And 9 of 48 rank order promotions to engineer on August 16, 1987, were awarded to minorities; the 8 additional out-of-rank-order promotions increased the minority

that were given to these minority firefighters, by promoting them out of sequence on the engineer promotional eligibility list, caused 8 nonminority firefighters—some of the Respondents herein—to be passed-over, although they had attained higher scores on the engineer promotional examination.

Likewise, on October 1, 1987, the City promoted 24 CFD lieutenants to the rank of captain. The first 23 promotions were done in sequence from the captain promotional list, and 5 black lieutenants (21.74%) were among the 23 lieutenants promoted in rank order to captain. However, because none of those promoted in rank order was Hispanic, the City, in keeping with the 25% quota, made one additional promotion, out-of-rank-order, to an Hispanic-American. (R. 26: Answer, ¶ 31; Pet. App. 28a, 87a.)

Both the engineer and captain promotional eligibility lists, which became subject to 25% quotas beginning in mid-1987, were compiled from final scores attained on the first set of CFD promotional examinations administered by the City to firefighters and lieutenants, respectively,[3] since the entry of the consent decree in *United States v. Albrecht,* Nos. 73 C 661, 80 C 1590 (N.D. Ill. March 31, 1980). (The consent decree is also referred to as the "order of settlement".) (R. 71: Joyce Aff. ¶ 7; Resp. App. 1a-7a.) The 1980 consent decree established a 1-to-4 minority/white promotion ratio, but this 20% quota was an interim measure, because it only applied to the 1979 lieutenant and engineer promotion lists; both of those eligibility lists have since lapsed and are not in-

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share of engineer promotions on that date from 18.75% to 30.35%. (Pet. App. 4a.)

[3] For the examinations at issue only firefighters were eligible to take the engineer examination, and only lieutenants were eligible to sit for the captain examination. (Pet. App. 3a; R. 74: Undisputed Facts, ¶ 7.)

volved in the *Chicago Fire Fighters* proceeding. (Resp. App. 3a; Pet. App. 21a, 92a.)

With respect to "future promotional eligibility lists," the consent decree did not establish any numerical quotas; rather, the decree provides that new promotional examinations were to be validated in accordance with the EEOC's Uniform Guidelines on Employee Selection Procedures. (Resp. App. 4a-6a; Pet. App. 6a.) To that end, the City spent four years developing the engineer exam, and consulted with the Department of Justice on a regular basis over the format and validation of the exam, as required by the consent decree. (R. 76: Joyce Dep. 15, 25-6, 136.)

Of the 1,035 firefighters who took the written portion of the engineer exam on January 19, 1985, 23.1% (239) were black and 6.7% (69) were Hispanic. This meant that the percentage of minorities taking the exam (29.8%) exceeded the percentage of minority firefighters employed by the CFD. (R. 76: Pltfs.' Ex. 1; Resp. App. 21a.) At the Department of Justice's suggestion, the written component was graded on a pass/fail basis to minimize adverse impact. (R. 76: Joyce Dep. 23-7.) Still, the raw scores resulted in serious adverse impact to minorities. To ameliorate this effect, the City standardized the scores on the basis of race. (*Id.* at 80, 90-1, 100.) Once race-normed, the pass rate for minorities was 52.92%, while the white pass rate was 62.44%, which meant that the success rate of minorities compared to the success rate of whites—84.75%—satisfied the "four-fifths" rule of the EEOC's Uniform Guidelines. 29 C.F.R. § 1607.4 (D).

A passing grade on the written component of the engineer exam qualified an applicant to take the practical, or "hands-on," portion of the test, which was conducted on a fire engine simulator. That device simulates the most "critically important" duty of an engineer, which is to supply a pressurized stream of water at the scene of a

fire, a task that requires proficiency in making hydraulic calibrations. (R. 76: Joyce Dep. 50, 102-06.) The simulator test score accounted for 90% of the cumulative grade on the engineer exam. Thus, both the City and the Department of Justice sought assurances that the simulator scores "would be suitable for ranking purposes." (*Id.* at 37.) Hence, an exhaustive pilot study was undertaken to determine if simulator test scores were feasible as a "ranking tool." (*Id.* at 34-5, 40, 48.) The pilot study was conducted among 40 incumbent engineers, half of whom were minorities, and the results satisfied the City that "there was a fair distribution of scores," with no indication of adverse impact, so that the simulator test scores "could be satisfactorily used as a ranking device." (*Id.* at 48-9.) The actual scores on the simulator test revealed that the minority pass rate (75.5%) compared to the white pass rate (87.1%), was 86.7% (.755/.871=.867), so adverse impact could not be inferred under the 80% rule. (*Id.* at 126-27.)

A content validation study was also performed for the captain promotional examination, and here again, pursuant to the consent decree, the Department of Justice had to be kept apprised of "each component or step of the selection process". The City "rigorously scrutinized" each component of the captain exam (and of the engineer exam, too). (R. 76: Joyce Dep. 181-82, 190-92, and Exs. 19, 23; R. 80: Undisputed Facts, ¶ 4; Resp. App. 5a-6a.) In September, 1986, the multiple choice portion of the test was administered to 543, or 86.8%, of the CFD's 625 lieutenants. While the participation rate among white lieutenants was 85% (463), 100% of all black lieutenants (63), and 94% of Hispanic lieutenants (17), took the captain exam. Consequently, for the labor pool eligible to take the captain exam, i.e., lieutenants, no disproportion existed on account of race among lieutenants who took the captain exam compared to lieutenants who were eligible to take the exam. (R. 74: Undisputed Facts, ¶ 12; R. 76: Joyce Dep. 196-98.)

The results of the written and oral components of the captain exam, which were thoroughly analyzed by the City for any hint of racial disparity, demonstrated that "there was no[] . . . practical significance in the difference [in the scores] between the various racial groups." (*Id.* at 206.) Hence, as acknowledged by the Commissioner of Personnel, Jesse Hoskins, neither the written or oral testing component, nor any other element of the captain examination (including rank order selection from the eligibility list), created any adverse impact whatsoever on minorities. (R. 74: Undisputed Facts, ¶ 13; R. 76: Hoskins Dep. 14, 39; Joyce Dep. 225, 227-28, 239-40.) Indeed, based on the City's projection that there would be 150 promotions from the captain eligibility list, awarding promotions in rank order on the basis of final test scores would have resulted in a success rate (i.e., promotion) of 50% for blacks and 46.6% for Hispanics. In contrast, the success rate for white lieutenants was only projected to be 42.9%. (R. 76: Joyce Dep. 227.)

B. The Receptivity of the District Court and Court of Appeals Panel to the Variable Reasons Offered by the City in Justification of the Quotas

The validation of both examinations in accordance with the consent decree, the elimination of adverse impact from the exams' testing components, the proportion of promotions that would be awarded to minorities on a strict rank order basis (21.14% of engineer promotions and 18.7% of captain promotions), did not, however, make any notable impression on the Washington administration. Instead, the "affirmative action" directives imposing the 25% promotional quotas, which issued for engineer on June 16, 1987, and for captain on July 9, 1987 (Resp. App. 8a, 15a), were justfied by Commissioner of Personnel Hoskins on three grounds common to both exams, and a fourth ground germane to the engineer exam alone:

1. The City, according to an opinion from the Corporation Counsel, would be in violation of the 1980

consent decree if it promoted in "strict rank order," (Resp. App. 9a, 16a), because the decree's "long range goal" was "to increase substantially the minority composition in each of the promotional ranks of the [CFD] with the objective that each rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." (Resp. App. 2a.) Of course, minority composition of the engineer and captain ranks would "become more representative of the racial and ethnic composition of the . . . ranks from which promotion to it are made," because the minority share of promotions on a rank-order-basis from the new lists were projected at 21% for engineer (at a time—1987—when minorities held 11% of the jobs as engineers, and accounted for 29% of all firefighters), and 18.7% for captain (when minorities held 3.6% of the captain jobs and 13.6% of all lieutenants were minorities). (Resp. App. 21a; R. 19: First Amended Complaint, Ex. A.)

The City, however, maintained that the consent decree demanded that minority composition within each rank "*mirror* the racial composition of the preceding rank." (Pet. App. 92a; emphasis added.) The City contended (and the district court and panel opinion concurred) that this goal had not been attained because in the seven years since the decree's entry, minorities had lost ground. (*Id.*, Pet. App. 38a.)[4]

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[4] The percentage of minority captains did drop between 1979, just prior to the consent decree's entry when 5.96% of captains were minorities, and mid-1987, when the City imposed 25% promotional quotas at which time minority captains accounted for 3.60% of that rank. However, for the officer corps as a whole (the ranks of lieutenant, captain and battalion chief), minority representation during this 7½ year period increased from 3.4% (32/940) to 10.35% (97/937). Moreover, for the CFD's most populous position, the rank of firefighter, minority representation more than doubled, going from 14.22% (388/2727) to 29.17% (799/2739). (R. 70: Undisputed Facts, ¶ 4; R. 71: Cole Aff. ¶ 12; R. 76: Pltfs'. Ex. 1; Resp. App. 21a.)

Furthermore, after Respondents in *Chicago Fire Fighters* brought suit in the district court, the City asserted that even if the consent decree by its terms did not mandate 25% quotas with respect to the new promotional exams,[5] the history of litigation leading up to the consent decree, if not the decree itself, justified the 25% quotas. (R. 70: City's Memorandum in Support of its Motion for Summary Judgment, p. 17.) The district court agreed with the City's assessment that in *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), while "no formal findings of discrimination were made. . . . the Department of Justice had made out a prima facie Title VII case of discrimination based upon the disparate impact of the [1969] Engineer, [1970] Lieutenant, and [1973] Captain exams. . . ." (Pet. App. 93a.) The panel decision took a significant leap in logic from the district court's opinion, when it concluded "that the City of Chicago's assessment that its policies *violated the Constitution* was a realistic one." (Pet. App. 36a; emphasis added.)[6]

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[5] A tacit concession to the holding in *Fire Fighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984), that a consent decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties."

[6] Although the complaint by the Department of Justice in *United States v. City of Chicago*, No. 73 C 661 (N.D. Ill.), included an allegation of constitutional violations under the Equal Protection Clause of the Fourteenth Amendment, the district court held that the constitutional claims could not survive after *Washington v. Davis*, 426 U.S. 229 (1976): "The weight of the evidence satisfies us that defendants, since at least 1966, have acted in good faith and conscientiously in attempting to eliminate race as a factor in making promotions. . . . Plaintiff has failed to show a discriminatory intent or purpose . . . and the statistical disproportion of promotions . . . among the white and non-Latino groups does not, in our opinion, give rise to a reasonable inference of unconstitutional or otherwise unlawful motives." *United States v. City of Chicago*, 14 FEP Cases 882, 884 (N.D. Ill. 1976). This holding was not challenged on appeal, with the Seventh Circuit ruling that for Title VII purposes "a plaintiff need only show that facially neutral standards have a

2. The City's affirmative action directives also attempted to justify the 25% quotas through invocation of a provision in the collective bargaining agreement, known as Appendix G, which enunciates the "goal" of 45% representation by minorities within the CFD, a goal that the City had "a very long way to go in meeting," noted Commissioner Hoskins. (Resp. App. 9a, 16a.) An integral provision of Appendix G, captioned "remedying past discrimination", also required the City to undertake a "review of the status of all Black and Hispanic fire fighters in order to determine those whose time in grade would make them eligible for promotion had not discriminatory practices existed in the past." (R. 82: Pltfs.' Ex. 3.) Yet, the affirmative action directives make no anecdotal references to instances where an Appendix G review uncovered past discrimination that impaired promotional opportunities for minorities, and no inquiries independent of the Appendix G review were conducted to determine whether any minority who might be awarded a preferential promotion had suffered employment discrimination caused by the City. (R. 74: Undisputed Facts, ¶ 19; R. 76: Joyce Dep. 170, 226.)

Neither the district court nor the panel of the Court of Appeals afforded probative value to the contract's affirmative action appendix,[7] except to remark that the clause "corroborate[s] other more direct evidence of past discrimination in the CFD." (Pet. App. 41a, 95a.)

3. The district court and the panel opinion viewed "statistics reflecting minority underrepresentation in the

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disproportionate impact on minorities", because "a showing of discriminatory purpose was not required in Title VII suits." *United States v. City of Chicago, supra*, 573 F.2d at 421.

[7] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (herein "Croson") ("conclusionary" statement that an affirmative action plan is "remedial" or that racial discrimination still plagues municipal projects "are of little probative value in establishing identified discrimination. . . .").

ranks of the CFD [as] provid[ing] the strongest evidence of past discrimination." (Pet. App. 42a, 95a). However, when the affirmative action directives were promulgated in June and July, 1987, the City did not rely on pertinent inter-rank statistical comparisons, i.e., firefighter/engineer, lieutenant/captain. Rather, the correspondence from Personnel Commissioner Hoskins to Fire Commissioner Galante perceived a disparity between the uniformed ranks of the CFD and "1980 census workforce availability figures":

> Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. *Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, respectfully, of each rank in the promotional sequence.* The actual utilization figures demonstrate a severe underutilization.
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> The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. * * * This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate. (Resp. App. 9a-10a, 16a-17a; emphasis added.)

Respondents, in opposing the City's motion for summary judgment in the district court, argued that the City's reliance on general labor market statistics was misplaced,

and that a more refined statistical comparison was required before the City could impose an affirmative action plan. (R. 75: Memorandum in Opposition to City's Motion for Summary Judgment, pp. 19-24.)[8] The district court agreed with this proposition, in part, declaring that "[i]n this case comparisons to the general labor population in Chicago are inappropriate." (Pet. App. 96a.)

However, alerted by the arguments in Respondents brief in opposition to summary judgment that statistical comparisons to the Chicago labor market were inapposite, the City's reply memorandum was accompanied by a supplemental affidavit of Deputy Commissioner of Personnel Robert Joyce; based on a statisitcal survey he had recently conducted (i.e., in the fall of 1989), Mr. Joyce determined that as of June, 1987, there existed a "disparity between the minority composition of the fire captain rank and that of fire lieutenants, and [a] disparity between the minority composition of the engineer rank and that of firefighters. . . ." (R. 80: Joyce Supp. Aff. ¶ 1; Pet. App. 43a, 97a.) These differences between the "expected" percentage of minorities in the ranks of engineer and captain, based on the "observed" percentage of minorities in the ranks of firefighter and lieutenant, re-

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[8] *Croson, supra,* 488 U.S. at 501-02, 504 ("where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task," and past discrimination, whether identified in this manner or otherwise, must be done "before" the public body "may use race-conscious relief"); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 308 n.13 (1977) ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."); *see also Janowiak v. Corporate City of South Bend,* 836 F.2d 1034, 1039-40 (7th Cir. 1987) (fire department's affirmative action hiring plan struck down on statutory and constitutional grounds "because the statistical comparison upon which the city based its plan focused not on the relevant qualified labor pool but on general population statistics"), *cert. denied,* 489 U.S. 1051 (1989).

spectively, were, in Joyce's opinion, "well beyond the possible effect of chance." (*Id.*, Supp. Aff. ¶ 2.)

For the district court and the Court of Appeals panel, the opinions expressed in the supplemental affidavit were "compelling." (Pet. App. 50a, 98a.) The data contained in the belated statistical analysis, measured under standard deviation theory, was deemed "sufficient to support an inference of discrimination," (Pet. App. 97a), and enough to satisfy the City's burden, as the proponent of the affirmative action plan, of demonstrating a " 'strong basis in evidence for its conclusion that' " [9] there had been discrimination in the past within the CFD, for which promotional quotas were considered the appropriate cure. (Pet. App. 41a-46a, 95a-98a, 100a.)

4. An additional rationale advanced by the City for the engineer promotional ratio was "that the 1985 Engineer examination had an adverse impact on minority candidates when used as a ranking device", because "the minority success rate of promotion was less than 80% of the white success rate of promotion. . . ." (Pet. App. 99a; Resp. App. 10a.) A firefighter's rank order standing on the engineer eligibility list was ultimately determined by the score attained in operating the fire engine simulator. (R. 76: Joyce Dep. 215, Ex. 6; Pet. App. 86a.) Although the results of the exhaustive validation study that the fire simulator had been put through by the City and the Department of Justice indicated that the simulator scores "could be satisfactorily used as a ranking device", (R. 76: Joyce Dep. 34-7, 40, 48-9), the City did a reversal of position in the courts below, claiming "that neither the practical nor written parts of the examination were properly validated as job related," and the engineer exam, "when used as a rank order device . . . was not (and could not have been) validated for rank order use." (Pet. App. 50a, 100a.)

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[9] *Croson*, 488 U.S. at 500, quoting *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (herein "*Wygant*").

C. The En Banc Decision

Judge Posner, who dissented from the panel's affirmance of the district court's judgment for Petitioners in the *Chicago Fire Firghters* case (Pet. App. 79a-83a), wrote for a five to four majority of the Court of Appeals in the proceedings en banc. (Pet. App. 1a-15a.) Having vacated the panel decision when rehearing en banc was granted, the Court of Appeals sitting en banc reversed the judgment of the district court, and remanded the case for trial.

Mindful that the entry of summary judgment under Rule 56(c), Fed. R. Civ. P., is proper only when "there is no genuine issue as to any material fact", Judge Posner's majority opinion found fault with the district court's expressions of certainty that promotional quotas were justified in 1987, given the state of the record compiled in the summary judgment proceeding:

> The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980. . . . This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.
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> That the city was determined to achieve or exceed its new goal of 25 percent minority promotions, regardless of what *any* test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. * * * Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it is validated. * * *

The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by non-biased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

* * * *

We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of 24 promotions, or 21 percent, would have been of minority candidates —all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. * * * [A] consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this is can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution . . . before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence.

* * * *

> Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this—21 percent—being promoted to captain without any "race-norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s.
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>
> There is concern and resentment about the use of policies of . . . reverse discrimination to practice a form of racial politics. . . . * * * The Supreme Court in the *Croson* decision made clear that cities and states would have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial. (Pet. App. 6a, 10a-14a; emphasis in original.)

SUMMARY OF ARGUMENT

Petitioners have advanced no compelling reason why this Court should exercise its discretion and give plenary consideration to the interlocutory decision of the Court of Appeals, which overturned the district court's grant of summary judgment and remanded this case for trial. Moreover, the Court of Appeals was correct in its holding that municipalities must justify the use of racial quotas with a quantum of evidence that satisfies the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment.

1. The Court of Appeals held that the City did not meet its burden of establishing that the constitutionality of its preference for racial quotas, over validated promotional examinations, could be resolved as a matter of law through the procedural vehicle of a motion for summary judgment. Accordingly, the court reversed the district court's judgment and remanded this matter for a trial on the merits. Petitioners concede that this ruling is "interlocutory", Petition at 26, but nevertheless attempt to ignore the consequences of the procedural posture of the appeal. The strict scrutiny analysis that the City's race based quotas must pass, however, requires "searching judicial inquiry into the justification for such race-based measures . . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The Court of Appeals held that because the record showed there were a host of unanswered questions regarding the necessity of the extreme remedy of racial quotas, such an inquiry could not be resolved as a matter of law, a conclusion which hardly justifies this Court's review.

2. Moreover, the Court of Appeals correctly put the City to the task of justifying its preference for racial quotas over validated promotional exams on the basis of a compelling governmental interest, supported by evidence of "identified discrimination". The City attempts to divert analysis of its racial quotas by criticizing the Court of Appeals rejection of its proffered justifications. Ultimately, however, the City's attempt to obtain this Court's review is reduced to its admission that it cannot expect to secure evidence that it engaged in purposeful discrimination against minority fire fighters seeking promotions within the department. (Petition at 27.) This lack of justification for the use of racial quotas hardly justifies this Court's plenary consideration; it mandates, instead, the judicial rejection of the quotas.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE COURT OF APPEALS REMANDED, THE CASE IS NOT RIPE FOR REVIEW BY THIS COURT

In *Croson,* 488 U.S. at 493, the Court held that all racial classifications, including those that are created by a municipality for ostensibly remedial purposes, are "highly suspect," and subject to a "strict scrutiny" standard of constitutional review. The very function of "strict scrutiny" is to insure that a solid "factual basis" exists for the suspect preferential treatment:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.*[10]

The Seventh Circuit's en banc decision has now concluded that the exacting scrutiny demanded by *Croson* was not adequately performed in the district court, because too many material questions of fact were left un-

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[10] These same considerations led the Court last Term to hold that allegations that a "State has created an unconstitutional racial gerrymander" are actionable under the Fourteenth Amendment: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno,* 61 U.S.L.W. 4818, 4820, 4826 (1993) (importing the *Croson* formula).

answered by the City.[11] Accordingly, the Court of Appeals has reversed the district court's grant of summary judgment, and has remanded the case for trial. In its present posture, then, Petitioners seek certiorari to review an interlocutory ruling. "However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court," and the petition for a writ of certiorari should be "denied." *Brotherhood of Loc. Firemen & Eng. v. Bangor & Aroostook, R. Co.*, 389 U.S. 327, 328 (1967) (per curiam), citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., Circuit Justice) ("[t]he policy against piecemeal interlocutory review other than as provided for by statutorily authorized appeals is a strong

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[11] Besides those mentioned in Judge Posner's majority opinion, additional fact issues remain for resolution on remand; *Croson* requires not only evidence of discrimination but also evidence of the scope of the injury caused by discrimination. 488 U.S. at 507, 510. With that in mind, in its Brief for the United States as *Amicus Curiae*, urging the Court of Appeals to reverse the district courts' judgments, the Department of Justice listed these as some of the issues of fact for disposition on remand: (i) to what extent, if any, have the promotional practices, challenged by the Department of Justice 20 years ago and which were remedied by the 1980 consent decree, persisted to cause injury; evidence will have to be elicited concerning the extent of the adverse impact of those challenged practices and the number of promotions made by the City on the basis of those practices; (ii) what was the extent of the injury caused by arguably discriminatory hiring practices, which the City claims still depresses the promotional ranks today, but that ended with a consent decree in 1974 requiring that 50% of new hires be minorities; (iii) why, in light of the preferences that the City has been affording to CFD minorities for at least 15 years, did the City not limit the promotional preferences to actual victims of past discrimination, as suggested in *Croson*, 488 U.S. at 508. *Amicus* Brief at 20-7. *See* Rosenblum, *Race-Conscious Employment Programs in the Post-Brennan Era: An End to Falsely Remedial Preferences?*, 28 Houston L. Rev. 993, 1056-58 (1991).

one"), citing, *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737 (1976).

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE CITY'S USE OF RACIAL QUOTAS MUST BE EXAMINED FURTHER TO DETERMINE WHETHER CONDITIONS IN THE CFD IN 1987 CONSTITUTED THAT EXTREME CASE WHERE, BECAUSE OF THE PERPETUATION OF PAST DISCRIMINATION, MINORITIES ARE STILL BEING SYSTEMATICALLY EXCLUDED FROM EMPLOYMENT OPPORTUNITIES

Petitioners, who argue that the "technically" interlocutory character of the en banc decision should be ignored, assert that the Court should exercise its discretion under Supreme Court Rule 10.1(a), and grant the writ because "[t]he Seventh Circuit's holdings that the Constitution forbids consideration of the consent decree and statistical evidence, and that the use of even a narrowly tailored promotional goal can be second guessed by a jury, are at odds with precedents of this Court, and flatly inconsistent with the law in other circuits." (Petition at 17.) As we discuss each of these points *seriatim,* it will become evident that Petitioners, in fashioning their arguments, have made a markedly circumscribed examination of the decisions of this Court in this developing area of the law.

1. According to Petitioners, "[t]he en banc majority held that the consent decree was wholly irrelevant to the City's permissible justifications for affirmative action; reliance on the decree would simply 'not be a defense.'" Petition at 18. The City argues that by virtue of the en banc decision it will be foreclosed from relying upon the consent decree as evidence of the continuing "effects of the City's prior discrimination on the composition of the upper ranks of the Fire Department. . . ." *Id.* at 17-8.

As we observed earlier in the Statement of the Case, *supra*, page 8, the City itself changed tack as far as what significance to attach to the 1980 consent decree. While Commissioner of Personnel Hoskins cited the consent decree as direct evidence of prior discrimination (Resp. App. 9a, 16a), the City did not contend in the district court or the Court of Appeals that the consent decree constituted evidence of past discrimination.[12] Rather, the City asserted that past discrimination could be inferred from the history of litigation in *United States v. City of Chicago*, 14 FEP Cases 882 (N.D. Ill. 1976), *reversed and remanded*, 573 F.2d 416 (7th Cir. 1978), leading to the entry of the consent decree. Respondents in *Chicago Fire Fighters* characterized that assertion as a "mere afterthought" because there was no evidence that the history of that litigation had been the subject of deliberations by Commissioner Hoskins or his cohorts "before" the decision to impose the quotas was made.[13]

The opinions of the district court (Pet. App. 90a-94a), and the Court of Appeals panel (Pet. App. 36a-41a), concentrated on the history of that litigation, taking exception with Respondents' contention "that the City's re-

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[12] The decree recognizes that the settlement does not constitute an admission by the City "nor is there to be any implication of an admission, that [the City] violated any provisions of Title VII of the Civil Rights Act. . . ." (Pet. App. 2a). Even absent this disclaimer, reliance upon the consent decree as proof, in-and-of-itself, of prior discrimination would run afoul of Fed. R. Evid. 408.

[13] "While the States and their subdivisions may take remedial action when they possess evidence . . . of prior discrimination, they must identify that discrimination, public or private, with some specificity *before* they may use race-conscious relief." *Croson*, 488 U.S. at 504 (emphasis supplied). As one commentator has noted: "The relevant inquiry, then, is the actual motivation of the legislature, not its *post hoc* rationalizations. * * * Indeed, a recurring problem in affirmative action litigation is that courts are 'presented with a series of *post hoc* arguments. . . .'" Cohen, *The Evidentiary Predicate for Affirmative Action after Croson: A Proposal for Shifting the Burdens of Proof*, 7 Yale L. & Policy Rev. 489, 514 (1989) (footnotes and citations omitted).

liance on the litigation history for its compelling interest is a 'mere afterthought.'" (Pet. App. 40a.) Although both of these since vacated decisions came to the conclusion that "the litigation history of the CFD's past hiring and promotion practices offers at least some evidence of past discrimination," (Pet. App. 38a-39a, 94a), neither court embraced the 1980 consent decree as probative evidence of past discrimination.[14]

Why Petitioners are roused to indignation over the en banc majority's similar reservations over the consent decree's probative value relative to past discrimination is particularly hard to fathom, because in his decision for the majority Judge Posner was willing to "assum[e] . . . that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980." (Pet. App. 6a; *see also,* Pet. App. 82a (Posner, J., dissenting).) At this juncture the en banc decision turns to the distinct "question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination." (Pet. App. 6a.) It is in this context that the Court of Appeals concludes that the 1980 consent decree had no bearing on whether

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[14] The Department of Justice, which had been invited by the Court of Appeals panel to submit a Brief as *Amicus Curiae* on whether "enforcement" of the 1980 consent decree "might be affected by the decision in these cases," responded as follows: "[T]he City may not rely on the consent decree as an independent justification for its actions. Because the long-term goal authorizes only race-conscious action that satisfies constitutional standards, the City's actions must stand or fall on their own merits." *Amicus* Brief at 15. *See Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 n.25 (11th Cir. 1987) (a consent decree "must be considered equivalent to a voluntary affirmative action plan for purposes of equal protection analysis," *citing, Wygant*), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989). Never alluding to the stance taken by the United States in its *amicus* brief, the City argues that it faces an untenable task: it must either comply with the consent decree (and risk a contempt citation if it fails to do so) or comply with the Constitution. (Petition at 22-3.)

the 25% promotional quotas were justifiable in 1987 and beyond: "Even if the measures had been required by the consent decree, which they were not . . . this would not be a defense." *Id.*

Petitioners fail to appreciate that these latter comments in the en banc opinion are directed as much toward *Croson*'s "narrowly tailored" prong, which requires "[p]roper findings . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects," 488 U.S. at 510 (O'Connor, J., plurality opinion), as to the "compelling interest" prong of the *Crosson* test, which requires a "strong basis in evidence" of past discrimination, 488 U.S. at 500. If conditions leading up to the 1980 consent decree made the incorporation of a 20% promotional quota appropriate at that time—and those preferences applied only to the 1979 lieutenant and the 1979 engineer promotion lists—the imposition of even more stringent promotional quotas (25%) seven years later, in 1987, was by no means foreordained. "[P]references may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own." *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993), *citing, United States v. Paradise,* 480 U.S. 149, 178-79 (1987); *compare, Wygant, supra,* 476 U.S. at 276 (Powell, J. plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

Furthermore, the observation made in the majority opinion that "plaintiffs were not parties to the decree," (Pet. App. 6a), is a telling reason for not allowing the 1987 quotas to be piggybacked onto the 1980 consent decree. If, as the City claims, the additional 1987 promotional quotas were imposed in deference to the 1980 consent decree, then the race-conscious remedy of the 1980 consent decree will take on a life of its own, with-

out ever being subject to the constitutional scrutiny now demanded by *Croson's* two pronged test. This is the point made in *Donaghy v. City of Omaha,* 933 F.2d 1448 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 938 (1992).

In *Donaghy,* a 1980 consent decree set long term hiring and promotional goals along with interim numerical targets that were to be attained during the life of the decree. The plaintiff in *Donaghy* was passed over for promotion in 1988 as a result of the decree's interim quotas, and he brought a reverse discrimination action. 933 F.2d at 1453. The Eighth Circuit held that in accordance with *Martin v. Wilks,* 490 U.S. 755 (1989), the plaintiff, who had not been a party to the suit resulting in the consent decree, must be afforded "the opportunity to prove that race-conscious measures *taken pursuant to the consent decree were invalid because the consent decree* (1) did not serve a remedial purpose, or (2) was not tailored narrowly enough." 933 F.2d at 1458 (emphasis added). Unlike *Donaghy,* where the plaintiff "was not foreclosed from" challenging the consent decree, *id.,* here, the City demands the absolute right to rely upon the 1980 consent decree to justify the 1987 promotional quotas, notwithstanding the fact that the CFD decree has never been scrutinized under the *Croson* test, as it will now have to be on remand. Judge Posner's majority decision is faithful to *Croson* and *Martin v. Wilks,* by refusing to accede to the preclusive effect that Petitioners wish to confer on the 1980 consent decree.

2. The second question Petitioners present for review is: "Whether a public employer may consider statistical evidence of a manifest racial imbalance in its workforce in assessing whether it has engaged in unconstitutional discrimination that may be redressed by race-conscious affirmative action." The City has once again altered the position it took in the courts below, where it contended not that it was confronted by a "manifest racial imbalance," but that "minority underrepresentation in the rele-

vant ranks of the CFD," constituted "compelling statistical evidence of past discrimination. . . ." (Pet. App. 41a, 98a). Framing the issue in terms of a "manifest racial imbalance" is hardly an innocuous turn of a phrase.

The Court has sustained affirmative action plans on account of a "manifest racial imbalance in traditionally segregated job categories" only when those plans have been challenged in reverse discrimination actions brought under Title VII. *United Steelworkers v. Weber,* 443 U.S. 193, 197 (1979); *Johnson v. Transportation Agency, Santa Clara,* 480 U.S. 616, 630 (1987) ("*Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. * * * Rather, it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories;") (citations omitted). When an affirmative action plan is challenged on constitutional grounds, as is the case here, the manifest imbalance test is wholly inappropriate, as Justice Brennan acknowledged in *Johnson.* 480 U.S. at 620 n.2, 630 n.8, 633 nn.10, 11.[15]

Semantics aside, Petitioners' critique of the en banc majority's treatment of the statistical record is unconvincing. To begin with, the City's contention that "the majority rejected the City's statistical evidence in its entirety . . . by holding that only evidence of 'actionable discrimination' will do, and that the proffered statistics were

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[15] The holdings in *Weber* and *Johnson,* which are based on finding of manifest imbalance, ulimately rest on the concept of "societal discrimination," a rationale which carries no weight in a constitutional challenge to an affirmative action plan. *Croson,* 488 U.S. at 497; Rosenblum, *supra,* n.11 at 1006, 1022-24; *see also* Spencer, *When Preferential Hiring Becomes Reverse Discrimination,* 14 Employee Relations L.J. 513, 523 (1989) ("[U]nder the Constitution, the test for affirmative action is not 'manifest imbalance' but a 'strong basis in evidence for believing that remedial action was required.' ").

'no evidence' of unconstitutional pre-1972 discrimination," Petition at 25, misstates the en banc decision. The majority viewed it as "implausible" that "the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974," i.e., the 2 year period between the date Title VII became effective as to the City and the date the City entered into the 1974 consent decree calling for 50% minority hiring. (Pet. App. 12a-13a.) But Judge Posner then opined that "it is possible that the city had been violating the Constitution . . . before 1972, by engaging in intentional discrimination. . . . [b]ut of this there is no evidence." (*Id.*)[16] Presumably, if the City can muster competent evidence of either post-1972 statutory violations or pre-1972 constitutional violations, these will be among the issues that will "requir[e] further exploration" on remand. (*Id.* at 13a.)[17]

Furthermore, any statistical analysis the City might present on remand must be far more finely tuned than the confusing array of statistics the City presented in the original proceeding in the district court. *See* Statement of the Case, *supra*, at 10-12. This proposition—which is implicit in the majority's insistence that the City offer

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[16] *Accord United States v. City of Chicago, supra*, n.6, 14 FEP Cases at 884 (holding that Department of Justice failed to show a discriminatory intent in CFD employment practices and that workforce statistics did not give rise to an inference of constitutional violations), *rev'd on other grounds, United States v. City of Chicago, supra*, 573 F.2d at 421.

[17] Petitioners' argument that the opinion en banc was wrong for rejecting inferences of statistical evidence resulting from "non-actionable discrimination," is disposed of by *Hazelwood School Dist. v. United States, supra*, 433 U.S. at 309-10, in which the Court upheld a public employer's defense that "statistical workforce disparities," even where due to the "purposeful[] exclu[sion]" of minorities prior to Title VII's effective date of March 24, 1972, did not amount to post-Act discrimination.

meaningful explanations of statistical disparities [18]—was made explicit in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

In *Wards Cove*, the Court held that the party seeking to establish that employment practices have had a disparate impact on minorities "must go[] beyond . . . show-[ing] that there are statistical disparities in the employer's work force," and is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 656, *citing*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J., concurring). Consequently, a complained of disparity must be shown to be "the result of one or more of the employment practices" under challenge, accompanied by a "showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites." 490 U.S. at 657. Harking back to the observation in *Watson* "that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures," 487 U.S. at 992, Justice White explained in *Wards Cove* that the "specific causation requirement" recognizes that a " 'myriad of innocent causes . . . may lead to statistical imbalances in the composition of . . . work forces.' " 490 U.S. at 657, citing, *Watson*. To provide a sound

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[18] To cite one example proffered by the majority opinion: ". . . the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) . . . . by itself proves little," because "the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 per-cent minority hiring quota fixed in the 1974 consent decree." (Pet. App. 11a.) *Cf. Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 66 (5th Cir. 1990) (a bare statistical comparison does not suffice, as a "complete picture of the Fire Department's personnel makeup and a systematic analysis of the racial effects of all the promotional criteria for each rank are required").

basis for remedial action, statistics must demonstrate that identified discrimination caused work force disparities.[19]

The *Wards Cove test,* which is "an integral part of the plaintiff's prima facie case in a disparate impact suit under Title VII," *id.* at 657, is logically an integral part of the burden that a public employer, the proponent of an affirmative action plan in a reverse discrimination context, must assume if it seeks to justify the race-conscious remedy by reliance upon statistical work force disparities. *Cf. Croson,* 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation. . . ."). [20] Without a more insightful explanation of how particular discriminatory practices caused work force disparities to persist, the affirmative action plan cannot survive strict scrutiny, because a showing of "[r]acial imbalance in one segment of an employer's workforce does not, without more, establish a prima facie case of disparate impact for the employer's other positions. . . ." *Wards Cove,* 490 U.S. at 653; *Maryland Troopers Ass'n v. Evans, supra,* 933 F.2d at 1077 (ab-

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[19] Multiple regression analysis is a statistical tool that may satisfy the causality requireemnt of *Wards Cove. See Long v. City of Saginaw,* 911 F.2d 1192, 1199-1200 (6th Cir. 1990); Rosenblum, *supra,* n.11 at 1058-59; *Cf.* Pet. App. 98a (the district court suggested that the City's "statistics are too simplistic, as they contain only one independent variable: race," and posited (erroneously under *Croson, Wards Cove* and the en banc decision), that plaintiffs must shoulder the burden of conducting such an analysis). Multiple regression "measures the discrete influence independent variables have on a dependent variable. . . . Typically the independent variables will be race, age, education level, and experience levels." *Segar v. Smith,* 738 F.2d 1249, 1261 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985); *Bazemore v. Friday,* 478 U.S. 385, 400 (1986).

[20] *See* Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality,* 87 Mich. L. Rev. 1729, 1764-65, 1768 (1989) (*Croson* "imposes a very high threshold for proof of causal connection"); Marshall, *Causation in Employment Discrimination Analysis: A Proposed Marriage of the Croson and Wards Cove Rationales,* 20 Univ. of Maryland L. Rev. 307, 362-66 (1991).

sent corroboration, in the form of "significant anecdotal evidence of racial discrimination," court rejects racial hiring and promotional preferences justified solely by statistical disparities, *citing, International Bhd. of Teamsters v. United States,* 431 U.S. 324, 338 (1977)).

Lamenting the fact that the en banc decision will require them to do more on remand than simply offer undifferentiated satistics, Petitioners suggest that they may not be successful in eliciting this type of explanatory evidence. (Petition at 27.) If that is the case, this may be a fatal admission by the City that it cannot satisfy the *Wards Cove* requirement of proof of a causal connection between identified employment practices (e.g., hiring, testing) and work force disparity. 490 U.S. at 657. That is reason enough why the writ should not be granted.

3. Lastly, Petitioners claim that "the majority below held that because the promotional examinations were content valid, the lists they produced had to be used in rank order regardless of whether strict rank order use could also be validated," and, Petitioners argue, because that conclusion is inconsistent with decisions in the Second and Ninth Circuits "which have upheld departures from strict rank order use of content-valid promotional exams," the Court should grant the writ. (Petition at 28.) Once again, this does not fairly represent the holding of the Court of Appeals. Taking note of the City's reversal of positions with respect to the content validity of the engineer's exam, Judge Posner observed that "[t]he city's grounds for rejecting the results of its tests sound like pretexts designed to give the city more freedom to practice . . . discrimination by departing from rank order fixed by nonbiased tests." (Pet. App. 11a.) However, the majority was willing to give the City another chance to prove at trial precisely what caused the City to reject the engineer simulator test: was the test rejected because it was "unconsciously, biased in favor of

whites," or because of a fixation with quotas for their own sake? (Pet. App. 10a-11a.)[21]

The en banc decision is entirely consistent with *Croson*, in which the Court emphasized that a public employer must "narrowly tailor[]" any affirmative action plan, and the starting point of that inquiry is whether the public entity "considered any alternatives to a race-based quota." 488 U.S. at 507. Save for a perfunctory statement in the affirmative action correspondence that quotas alone were feasible,[22] there is no evidence, and a material issue of fact exists, as to whether City officials, in the closed door meetings where the CFD quota system was hatched, ever "carefully examined" any alternatives to quotas. *Id.*

As the record now stands, then, the City rushed to judgment when it imposed the 25% quotas, notwithstanding the admonition in *Croson* that this most extraordinary of remedies is reserved for the "extreme case" and should only be utilized when "necessary to break down patterns of deliberate exclusion." 488 U.S. 509 (O'Connor, J., plurality opinion); *see also, United States v. Paradise, supra,* 480 U.S. at 196-97, 200 (O'Connor, J., dissenting).

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[21] Recall too that when the promotional quotas were adopted in 1987, the City was all too ready to justify them because the percentage of minority engineers and captains did not compare favorably to the percentage of minorities in the general labor population in Chicago. (Pet. App. 96a.) Needless to say, this Court's admonition 10 years earlier in *Hazelwood,* 433 U.S. at 308 n.13, that comparisons to the general population are meaningless when the jobs at issue require special qualifications, went unheeded by City officials, including the attorney in the Corporation Counsel's office who drafted the affirmative action directives bearing Commissioner Hoskins' signature. (R. 76: Joyce Dep. 222-24.)

[22] *See Wygant,* 476 U.S. at 278 n.5 (public employers' concession, "now that it is in their interest to make such a concession" that they had "discriminated in the past," lacks probative value).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari, submitted on behalf of the City of Chicago and certain of its officials, should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 661
No. 80 C 1590

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICHARD G. ALBRECHT, Commissioner, City of Chicago Fire Department, *et al.*,
Defendants.

ORDER OF SETTLEMENT

On March 31, 1980, the United States, by the Attorney General, filed the complaint in this action alleging that the promotional practices and procedures followed with respect to the City of Chicago Fire Department violated the prohibitions against discrimination on the basis of race and national origin of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §§ 2000e, *et seq.*) The complaint alleges that the victims of the defendants' unlawful discrimination are blacks and Hispanics seeking promotion within the Fire Department. The plaintiff and defendants, with and through their counsel, have met and conferred with regard to these allegations and have concluded that the litigation of the action is not in the best interest of any party or the commonly agreed to objective of increasing the promotional and other employment opportunities of blacks and Hispanics within the City of Chicago Fire Department.

Accordingly, the plaintiff and the defendants have presented this Order of Settlement to the Court for entry in full resolution of this action and of the promotional issues raised in a previously filed action, *United States* v. *City of Chicago, et al.* (Civil Action No. 73-C-661), now pending appeal. By so doing, the defendants do not admit, nor is there to be any implication of an admission, that they or any of them have violated any provisions of Title VII of the Civil Rights Act of 1964, as amended.

The Court finds that this Order of Settlement and its entry are lawful under, consistent with, and will further the purposes and objectives of Title VII of the Civil Rights Act of 1964, as amended, and therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants, Richard G. Albrecht, Commisisoner, City of Chicago Fire Department, *et al.*, and each of them, their officers, officials, agents, employees, successors in office, and all persons or organizations in active concert or participation with them shall be and remain permanently enjoined and restrained from discriminating against any applicant or candidate for promotion to, or holder of, any rank within the City of Chicago Fire Department above the entry level rank of Firefighter on the basis of race or national origin and from failing or refusing to fully comply with and implement the provisions of this Order.

1. *Long Range Promotional Goal.* The defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the City of Chicago Fire Department with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

2. *The 1979 Engineer and Lieutenant Eligibility Lists.*

A. Defendants may continue to make operational use of the 1979 Engineer Eligibility List and the 1979 Lieutenant Eligibility List for purposes of rank order promotions therefrom, provided that if the defendants determine that the needs of the City of Chicago require further promotions be made beyond number 213 on the 1979 Engineer List and/or number 113 on the 1979 Lieutenant List prior to the development of new lists in conformity with paragraph 3 below, such further promotions from the 1979 Engineer and Lieutenant Lists shall be made such that one black or Hispanic Firefighter shall be promoted for every four white Firefighters promoted.

B. If necessary to meet the obligations imposed by paragraphs 2(A) above, the 1979 Engineer and Lieutenant Eligibility Lists shall be expanded by reducing the cut off score from 70, provided that any such reduction in a cut off score need not exceed one standard deviation below the mean score obtained by black and Hispanic candidates as a group on the test involved.

C. Once a new Engineer or Lieutenant eligibility list is developed pursuant to and in conformity with the requirements of paragraph 3 below, the corresponding 1979 list shall be stricken and used no further.

3. *Future Promotional Eligibility Lists.*

A. The defendants shall proceed to undertake to compile new promotional eligibility lists, subject to the conditions and limitations set forth in paragraphs 3(B) through 3(E) below.

B. Such new eligibility lists and/or the promotions made therefrom shall be consistent with the long term goal for the promotion of blacks and Hispanics within the City of Chicago Fire Department set forth in paragraph 1 above.

C. Any qualifications, tests or other selection standards or procedures for promotion in the City of Chicago Fire Department that the defendants may use or adopt shall be designed so as to eliminate or reduce any adverse impact against black or Hispanic applicants for promotion, and otherwise shall be consistent with the standards and requirements of the *Uniform Guidelines on Employee Selection Procedures,* 43 Fed. Reg. 38290.

D. Any qualifications, tests or other selection standards or procedures for promotion in the City of Chicago Fire Department which are used or adopted by the Defendants shall be sufficiently objective to prevent, or otherwise shall be designed to ensure against, any unlawful discrimination against blacks and Hispanics seeking promotion. In this regard, the defendants shall apply statistical tests to, and otherwise conduct analyses of, the various data generated in the course of compiling the 1979 Engineer and Lieutenant Eligibility Lists, for the purposes of better understanding, eliminating, and correcting for any unlawful discrimination against blacks and Hispanics. Such tests and analyses shall be conducted in cooperation and coordination with the plaintiff, and the plaintiff shall be kept fully informed by written reports of the progress and results of such tests and analyses.

E. Training opportunities shall be provided to personnel within the City of Chicago Fire Department who desire to seek promotions within the department. Such training opportunities shall be provided prior to the initiation of any promotional selection procedures and they shall be appropriate to the rank involved.

4. *Regular Reports.* For each six month period ending June 30 or December 31, the following reports shall be served on the United States within 30 days of the close of the reporting period:

A. Eligibility Lists. A copy of each promotional eligibility list in effect during the reporting period, with the

name, race or national origin, service date, and final score, in rank order, of all candidates. Such lists shall be updated with each report to reflect cumulatively:

1. Candidates promoted and date of promotion.

2. Candidates passed over or rejected for promotion to the rank in question, the dates of such pass overs or rejections, and the reasons for each.

3. Candidates expected to be promoted within the next six months.

B. *Validation Efforts.* In addition to the reports called for by paragraph 3(D) above, which shall be made whenever appropriate under that paragraph, a progress report or detailed summary shall be provided of all efforts made and results obtained in compliance with paragraphs 3(A) through 3(E) above. Each report or summary shall include:

1. A description of the qualification, test or other selection standard or procedure and the study or other action undertaken in connection with it.

2. A description of each of the steps taken to comply with the standards for validation of qualifications, tests or other selection standards or procedures as set forth in the *Uniform Guidelines on Employee Selection Procedures,* especially those standards contained in sections 14 and 15 of the Guidelines.

5. *Special Reports.* The following reports shall be due within the time periods indicated:

A. *Proposed Striking of Promotional Eligibility Lists.* At least 60 days in advance of the striking of any City of Chicago Fire Department promotional eligibility list a copy of that list, updated to conform with paragraphs 4(A)(1) and (2) above, shall be provided to the United States with an indication of the proposed date of striking

and the identification of any additional persons thereon expected to be promoted prior to the striking.

B. *Proposed Adoption of New Promotional Eligibility Lists.* At least 60 days in advance of the adoption of any new City of Chicago Fire Department promotional eligibility list, a copy of that list with race and ethnic identifications and statistical data on the pass/fail rates (percentages and absolute numbers by race or ethnic status) for each component or step of the selection process shall be provided to the United States. For each list submitted, all the current information on the projected duration of that list, the number of anticipated promotions to be made from it during each half year of that period, and an explanation as to how the list or its use will comply with the requirements of paragraph 1, above, shall also be provided. Should the United States have objection to any new promotional eligibility list or its proposed utilization, it shall file such objection with the Court within 45 days of its receipt of that list and, if the United States files such an objection, the list shall not become operational until approved by the Court. Until any such future promotional eligibility list is approved for operational use by the Court, or the United States has indicated to the defendants that it has no objection, or the 45-day period for objection has expired without the United States filing an objection, the contents of the list shall not be disclosed to any candidates thereon or otherwise made public by the defendants or any other party.

6. *Meetings of the Parties.* Upon reasonable notice of the plaintiff or any of the defendants, the parties and their counsel shall meet and confer about any matter concerning this Order or its implementation. The purpose of such meetings shall be to anticipate and avoid or resolve by agreement any future disputes which might arise. To that end, any party anticipating any dispute shall call for such a meeting.

7. *Obligation of the United States.* The United States agrees that the entry of this Order of Settlement shall serve not only to settle all issues raised in this present action, but shall also serve to finally resolve and settle all issues concerning promotional practices within the City of Chicago Fire Department raised in *United States* v. *City of Chicago*, Civil Action No. 73-C-661. Accordingly, the United States in No. 73-C-661 shall notify the United States Court of Appeals for the Seventh Circuit of the entry of this Order and move that Court for the entry of an order dismissing the appeal of the United States filed in No. 73-C-661.

The Court shall retain jurisdiction of this cause for purposes of entering any orders for enforcement or, in light of experience had under this Order, any orders of modification or amendment.

ORDERED this the 31st day of March, 1980.

/s/ Frank J. McGarr
United States District Judge

/s/ Canella E. Henrichs
CANELLA E. HENRICHS
Assistant United States
Attorney
for the United States

AGREED and CONSENTED to:

ROBERT T. MOORE
Attorney
Department of Justice
for the United States

/s/ Daniel Pascale
DANIEL PASCALE
Deputy Corporation Counsel
City of Chicago,
for all defendants

[City Seal]

CITY OF CHICAGO
Harold Washington, Mayor

DEPARTMENT OF PERSONNEL

Jesse E. Hoskins
Commissioner

Sam Ackerman
First Deputy Commissioner

City Hall, Room 1100
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-4000

June 16, 1987

Louis Galante
Commissioner
Department of Fire
Room 105
121 North LaSalle Street
Chicago, Illinois 60602

Dear Commissioner Galante:

As we approach the third set of promotions from the Engineer Eligible List we have given consideration to the need to utilize an affirmative action promotion policy in making these and subsequent promotions from this list. For the reasons set forth below, it is our conclusion that promotions from this list should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic.

There are four independent reasons why affirmative action promotion ratios are warranted. First, we are under a continuing obligation to comply with the 1980 consent

decree signed by Judge McGarr. That decree requires the City to pursue a goal of promoting Blacks and Hispanics in sufficient numbers so as to increase substantially the minority compostion at each promotional rank, so that each rank will become more representative of the rank from which promotions are made. Currently, Blacks comprise 23.20% of Firefighters but only 9.46% of Engineers, and Hispanics comprise 5.70% of Firefighters but only 1.51% of Engineers. Based on these figures, it is the opinion of the Corporation Counsel that we would be in violation of the consent decree were we to adhere to strict rank order in making promotions to Engineer.

Second, pursuant to Appendix G of the collective bargaining agreement, we are required to follow promotion policies designed to achieve, as quickly as reasonably possible, a level as close as reasonably possible to 45% Black and Hispanic representation at each rank. With less than 11% Black and Hispanic representation at the rank of Engineer, we quite obviously have a very long way to go in meeting the 45% goal.

Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, respectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a severe underutilization:

	Blacks	Hispanic
External Availability	approx. 35%	approx. 10%
Firefighters	23.20%	5.70%
Engineers	9.57%	1.51%
Lieutenants	10.4 %	3.1 %
Captains	2.10%	1.03%
Battalion Chiefs	1.01%	1.01%

The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination. Further affirmative action is therefore necessary.

The fourth reason we need to promote on an affirmative action basis is to avoid violating Title VII of the Civil Rights Act of 1964, as amended. An examination of the overall test scores (which weigh a written test, oral test and seniority factor) shows that the Engineer promotional procedure has an adverse impact on minorities when used as a ranking device. Further, based on your familiarity with both the testing procedure and the position of Engineer, you have expressed your belief that small differences in scores do not indicate any real difference in ability to perform the responsibilities of an Engineer. Under these circumstances, we would risk violating Title

VII were we to adhere to strict rank order in making promotions to Engineer. This, of course, would also constitute an additional violation of the 1980 Consent Decree.

For these four reasons, we believe that an affirmative action promotion policy is warranted. It is especially important that we pursue such a policy at the present time because of the unique opportunity we have in the short term future to integrate the promotional ranks while imposing the least burden on white firefighters. As you know, the upper ranks of the Fire Department include a large number of workers who are nearing retirement, making room for a larger than ordinary number of promotions from the lower ranks. This has two consequences. First, if we fail to pursue affirmative action in promotions during this period of substantial turnover we will again freeze in a pattern of having virtually all whites at the upper ranks. Second, the large number of promotional opportunities that will be available in the next few years will permit the promotion of a substantial number of Blacks and Hispanics without closing off promotional opportunities for other members of the Department. Thus this is a particularly appropriate time to pursue affirmative action.

In determining that promoiton ratios of 20% Black and 5% Hispanic should be used in making promotions to the rank of Engineer, a number of important considerations were taken into account. First, we selected a system of promotion ratios only after concluding that no other approach would permit meaningful affirmative action progress. Both by contract and as a result of the Department's operating needs, promotions to the rank of Engineer must be made from the rank of Firefighter, and by contract we must customarily promote in rank order. Thus this clearly is not a situation where a race-neutral approach such as aggressive outside recruitment could be used to achieve affirmative action goals.

Second, we considered the impact that these ratios would have on the promotional opportunities of other candi-

dates on the Engineer Eligible List. In view of the current severe underutilization at the rank of Engineer, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion.

Third, we also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the Engineer promotional exam procedure. Further, an examination of the rank order test scores shows that there will be no meaningful difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order. Your Department has estimated that 300-350 Engineers will be promoted off the new Eligible List. Were we to promote 350 individuals in strict rank order, the lowest score achieved by a candidate obtaining promotion would be 84.8190. The 20%/5% Black/Hispanic goals can be satisfied without promoting anyone scoring lower than 78.9771. You have indicated that such a difference of less than 6 points on a 100 point scale does not indicate any real difference in qualifications for the position of Engineer.

Fourth, we took into account the racial composition of the pool of applicants for the position of Engineer. The 20% and 5% goals are slightly lower than the percentages of Blacks and Hispanics at the lower rank of Firefighter, and they are slightly lower than the percentages of Blacks and Hispanics who applied for the position of Engineer.

Next, we considered our obligations under the collective bargaining agreement. Under the Goldstein arbitration award, it is clear that the Department may use affirmative action as a basis for departing from strict rank order promotions.

Finally, we are aware that the Fire Department, like the Police Department, is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels.

For all these reasons we have determined that the 20% Black and 5% Hispanic promotion goals are both necessary and reasonable. Based on the composition of the Eligible List and current estimates of the number of Engineers to be promoted, we are confident, as noted above, that these goals can be met without promoting unqualified candidates. However, we emphasize that in no event should these ratios be applied if doing so would result in the promotion of an unqualified candidate.

We also wish to emphasize that these goals are temporary ones designed to remove the effects of past discrimination, not to maintain racial balance once the effects of past discrimination have been corrected. Given the present severe underutilization at the rank of Engineer, we anticipate that these goals will be appropriate for three years or until 350 promotions have been made off the new Engineer Eligible List, at which point we will reassess the situation completely. Moreover, to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotion goals will be reevaluated on an annual basis.

Please contact me if you have any questions or if you believe that additional considerations would warrant modification of the approach we have proposed.

Sincerely,

/s/ Jesse E. Hoskins
JESSE E. HOSKINS
Commissioner of Personnel

cc: Dobbins
Holewinski
Miner
Patch

JEH/RTJ/fc

[City Seal]

CITY OF CHICAGO
Harold Washington, Mayor

DEPARTMENT OF PERSONNEL

Jesse E. Hoskins
Commissioner

Sam Ackerman
First Deputy Commissioner

City Hall, Room 1100
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-4000

July 9, 1987

Louis Galante
Commissioner
Department of Fire
Room 105
121 North LaSalle Street
Chicago, Illinois 60602

Dear Commissioner Galante:

Attached for your information is the official new Fire Captain promotional Eligible List. We understand that your Department anticipates promoting approximately 150 Captains off of this list, assuminng that the list remains in use for three years. If these promotions were to be made in strict rank order, Blacks and Hispanics would receive, respectively, 14.0% and 4.7% of the promotions to Captain. Given our equal employment/ affirmative action obligations, we believe that these figures are too low. For the reasons set forth below, it is our conclusion that promotions from this list should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Captain would be Black

and an additional 5% of those promoted would be Hispanic.

There are three independent reasons why affirmative action promotion ratios are warranted. First, we are under a continuing obligation to comply with the 1980 consent decree signed by Judge McGarr. That decree requires the City to pursue a goal of promoting Blacks and Hispanics in sufficient numbers so as to increase substantially the minority composition at each promotional rank, so that each rank will become more representative of the rank from which promotions are made. Currently, only 3% of Captains are Black or Hispanic, whereas Blacks and Hispanics comprise 13.5% of Lieutenants and approximately 26% of Firefighters/Engineers (the two ranks eligible for promotion to Lieutenant). Based on these figures, it is the opinion of the Corporation Counsel that we would be in violation of the consent decree were we to adhere to strict rank order in making promotions to Captain.

Second, pursuant to Appendix G of the collective bargaining agreement, we are required to follow promotion policies designed to achieve, as quickly as reasonably possible, a level as close as reasonably possible to 45% Black and Hispanic representation at each rank. With only 3% Black and Hispanic representation at the rank of Captain, we quite obviously have a very long way to go in meeting the 45% goal.

Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, re-

spectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a severe underutilization.

	Blacks	Hispanic
External Availability	approx 35%	approx. 10%
Firefighters	23.20%	5.70%
Engineers	9.46%	1.51%
Lieutenants	10.4 %	3.1 %
Captains	2.10%	1.03%
Battalion Chiefs	1.01%	1.01%

The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination.

For these three reasons, we believe that an affirmative action promotion policy is warranted. It is especially important that we pursue such a policy at the present time because of the unique opportunity we have in the short term future to integrate the promotional ranks while imposing the least burden on white firefighters.

As you know, the upper ranks of the Fire Department include a large number of older workers who are nearing retirement, making room for a larger than ordinary number of promotions from the lower ranks. This has two consequences. First, if we fail to pursue affirmative action in promotions during this period of substantial turnover we will again freeze in a pattern of having virtually all

whites at the upper ranks. Second, the large number of promotional opportunities that will be available in the next few years will permit the promotion of a substantial number of Blacks and Hispanics without closing off promotional opportunities for other members of the Department. Thus this is a particularly appropriate time to pursue affirmative action.

In determining that promotion ratios of 20% Black and 5% Hispanic should be used in making promotions to the rank of Captain, a number of important considerations were taken into account. First, we selected a system of promotion ratios only after concluding that no other approach would permit meaningful affirmative action progress. Both by contract and as a result of the Department's operating needs, promotions to the rank of Captain must be made from the rank of Lieutenant, and by contract we must customarily promote in rank order. Thus this clearly is not a situation where a race-neutral approach such as aggressive outside recruitment could be used to achieve affirmative action goals.

Second, we took into account the fact that the rank of Captain is a crucial rank for opening higher positions to minorities. Until we enlarge the pool of Black and Hispanic Captains we will be unable to even begin to make appreciable progress in integrating the rank of Battalion Chief, which remains virtually all white. Additionally, as you have noted, experience at the rank of Captain or Battalion Chief is an essential prerequisite for promotion to the exempt command positions such as Deputy District Chief or District Chief. Given our commitment to integrating the leadership positions in the Department, it is essential that minorities obtain experience at the rank of Captain. The 20% Black and 5% Hispanic goals will allow us to make moderate but meaningful progress.

Third, we considered the impact that these ratios would have on the promotional opportunities of other candidates on the Captain Eligible List. In view of the current

97% white composition of the rank of Captain, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion.

We also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the Captain promotional exam procedure, which weighs a written test, oral test and seniority factor. Further, an examination of the rank order test scores shows that there will be virtually no difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order. Your Department has estimated that 150 Captains will be promoted off the new Eligible List. Were we to promote in strict rank order, the lowest score achieved by a candidate obtaining promotion would be 78.16. The 20%/5% Black/Hispanic goals can be satisfied without promoting anyone scoring lower than 76.82. Your Department has indicated that such a difference of less than 1.5 points on a 100 point scale does not indicate any real difference in qualifications for the position of Captain.

Next, we considered our obligations under the collective bargaining agreement. Under the Goldstein arbitration award, it is clear that the Department may use affirmative action as a basis for departing from strict rank order promotions.

Finally, we are aware that the Fire Department, like the Police Department, is a community service organization which needs the trust and cooperation of the community

it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels.

For all these reasons we have determined that the 20% Black and 5% Hispanic promotion goals are both necessary and reasonable. Based on the composition of the Eligible List and current estimates of the number of Captains to be promoted, we are confident, as noted above, that these goals can be met without promoting unqualified candidates. However, we emphasize that in no event should these ratios be applied if doing so would result in the promotion of an unqualified candidate.

We also wish to emphasize that these goals are temporary ones designed to remove the effects of past discrimination, not to maintain racial balance once the effects of past discrimination have been corrected. Given the present severe underutilization at the rank of Captain, we anticipate that these goals will be appropriate for three years or until 150 promotions have been made off the new Captain Eligible List, at which point we will reassess the situation completely. Moreover, to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotion goals will be reevaluated on an annual basis.

Please contact me if you have any questions or if you believe that additional considerations would warrant modification of the approach we have proposed.

Sincerely,

/s/ Jesse E. Hoskins
JESSIE E. HOSKINS
Commissioner of Personnel

cc: Dobbins
Holewinski
Miner
Patch

JEH/RTJ/dvm

CHICAGO FIRE DEPARTMENT CENSUS

AUGUST 1979:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	99	0	1	1.01%
Captain	218	12	1	5.96%
Lieutenant	623	16	2	2.88%
Engineer	366	13	1	3.82%
Fire Fighter	2727	338	50	14.22%

MAY 17, 1983:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	109	0	0	0.0 %
Captain	206	8	2	4.85%
Lieutenant	743	50	13	8.47%
Engineer	553	48	7	9.94%
Fire Fighter	2927	575	123	23.84%

DECEMBER 31, 1986:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	101	2	1	2.88%
Captain	181	4	3	3.86%
Lieutenat	625	63	18	12.96%
Engineer	470	45	8	11.27%
Fire Fighter	2694	620	152	28.65%

June 30, 1987:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.06%
Captain	194	5	2	3.60%
Lieutenant	646	68	20	13.62%
Engineer	464	44	7	10.99%
Fire Fighter	2739	638	161	29.17%

(R.79: Undisputed Facts ¶ 4; R.71: Cole Aff. ¶ 12; R.76: PX 1.)